

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JACK PERMISON,

Plaintiff,

V.

**COMCAST HOLDINGS CORPORATION,
OUTREACH COMMUNICATIONS, LLC AND
CONVERGENT OUTSOURCING, INC. F/K/A
ER SOLUTIONS, INC.**

Defendants.

No. 3:12-cv-05714-BHS

DEFENDANT COMCAST HOLDINGS
CORPORATION'S MOTION TO
COMPEL ARBITRATION AND
STAY LITIGATION

Note on Motion Calendar:

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1 **STATUTES**

2	9 U.S.C. § 2	6
3	9 U.S.C. § 3	8
4	9 U.S.C. § 4	8
5	47 U.S.C. § 227(b)(1)(A)(iii)	1

I. INTRODUCTION

Defendant Comcast Holdings Corporation (“Comcast” or “Defendant”), by and through its undersigned counsel and pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, respectfully moves this Court for an Order compelling Plaintiff Jack Permison (“Plaintiff”) to submit his claims to binding individualized arbitration pursuant to the Comcast Residential Customer Agreement, and to stay litigation pending arbitration.

Plaintiff Jack Permison, a resident of Gig Harbor, Washington, subscribes to Comcast's residential cable television and Internet services. On or about August 10, 2012, Plaintiff filed this action against Defendants, alleging that Comcast and companies it hired placed a series of "non-emergency telephone calls" to his cellular telephone without his prior, express consent "using an automatic dialing system and/or an artificial or prerecorded voice" in an effort to collect an outstanding obligation that Plaintiff owed to Comcast. Compl. [Dkt. No. 1] ¶¶ 5, 7. Plaintiff alleges these calls violated the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(A)(iii). *Id.* ¶¶ 25-30.

Although Comcast believes that Plaintiff's claims are without merit, Comcast and Plaintiff are parties to the Comcast Residential Customer Agreement, which requires that an arbitrator, not a court, make that determination. Indeed, when given the opportunity to opt out of arbitration without affecting his receipt of service, Plaintiff elected not to do so. Thus, Comcast respectfully requests that the Court compel him to honor the parties' written agreement to arbitrate this dispute.

II. BACKGROUND

A. Mr. Permison Agreed to Arbitrate His Claims.

On or about February 3, 2012, Plaintiff signed up for Comcast cable television and Internet services with an account located at 7314 102nd Street CT NW, Apt. A, Gig Harbor, Washington. *See* Decl. of Mary Kane, dated October 4, 2012 ¶ 3. Rather than have a Comcast professional visit his home and install his equipment, Plaintiff elected to “self-install” his equipment and activate service on his own. *Id.*

**COMCAST'S MOTION TO COMPEL ARBITRATION
AND STAY LITIGATION (No. 3:12-cv-05714-BHS) — 1**

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1 As part of its regular and routine business practices, Comcast provides subscribers who
 2 self-install their equipment with a “self-installation kit,” which includes instructions for
 3 installing and activating Comcast cable and Internet services equipment. *Id.* Contained in the
 4 self-installation kit is a Welcome Kit, which includes a copy of Comcast’s then current terms
 5 and conditions (the “Comcast Residential Customer Agreement”). *Id.* ¶ 4. The Comcast
 6 Residential Customer Agreement is also available online at:

7 <http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html>.

8 In order to complete the self-install process, customers are directed to activate their
 9 service by visiting Comcast’s website at www.comcast.com/activate and to follow the
 10 instructions displayed on their computer screen. As part of that activation process, customers
 11 are required to read and accept Comcast’s “Terms of Service” contained in the Comcast
 12 Residential Customer Agreement. Customers must indicate that they have read and agree to
 13 those terms by clicking a box on their computer screen stating: “Yes, I agree to the Terms of
 14 Service.” Plaintiff agreed to the Comcast Residential Customer Agreement by clicking that
 15 box. *Id.* ¶ 6.

16 The Comcast Agreement for Residential Services included a written arbitration
 17 provision. *Id.* ¶ 7. The opening paragraphs of the Comcast Agreement for Residential Services
 18 states as follows:

19 XFINITY Service(s) will be provided to you...on the terms and
 20 conditions set forth in this Agreement for Residential Services (the
 21 “Agreement”)...Unless this Agreement or applicable law specifies
 22 otherwise, we will give you thirty (30) days prior notice of any
 23 significant change to this Agreement. If you find the change
 24 unacceptable, you have the right to cancel your Service(s). However, if
 25 you continue to receive Service(s) after the end of the notice period (the
 26 “Effective Date”) of the change, you will be considered to have accepted
 27 the changes. You may not modify this Agreement by making any typed,
 handwritten, or any other changes to it for any purpose. Note: This
 Agreement contains a binding arbitration provision in Section 13 that
 affects your rights under this Agreement with respect to all
 Service(s)...You will have accepted this Agreement and be bound by its
 terms if you use the Service(s) or otherwise indicate affirmative
 acceptance of such terms.

1 *Id.*, Ex. 1 (typography and emphasis in original). It also advised Plaintiff that he could opt out
 2 of the written arbitration provision without having any adverse effect on his relationship with
 3 Comcast. It specifically provided that, in order to opt out, Plaintiff was required, within thirty
 4 (30) days of receiving the Comcast Agreement for Residential Services, to write to Comcast or
 5 fill out a simple form on www.comcast.com/arbitrationoptout:

6 IF YOU DO NOT WISH TO BE BOUND BY THE ARBITRATION
 7 PROVISION, YOU MUST NOTIFY COMCAST WITHIN 30 DAYS
 FROM THE DATE THAT YOU FIRST RECEIVE THIS
 AGREEMENT BY VISITING
 8 WWW.COMCAST.COM/ARBITRATIONOPTOUT, OR BY MAIL TO
 9 COMCAST 1701 JOHN F. KENNEDY BLVD., PHILADELPHIA, PA
 19103-2838, ATTN: LEGAL DEPARTMENT/ARBITRATION.
 10 YOUR WRITTEN NOTIFICATION TO COMCAST MUST INCLUDE
 YOUR NAME, ADDRESS AND COMCAST ACCOUNT NUMBER
 AS WELL AS A CLEAR STATEMENT THAT YOU DO NOT WISH
 11 TO RESOLVE DISPUTES WITH COMCAST THROUGH
 ARBITRATION. YOUR DECISION TO OPT OUT OF THIS
 12 ARBITRATION PROVISION WILL HAVE NO ADVERSE EFFECT
 ON YOUR RELATIONSHIP WITH COMCAST OR THE DELIVERY
 13 SERVICES TO YOU BY COMCAST. IF YOU HAVE PREVIOUSLY
 14 NOTIFIED COMCAST OF YOUR DECISION TO OPT OUT OF
 ARBITRATION, YOU DO NOT NEED TO DO SO AGAIN.

15 *Id.* (typography and emphasis in original). After receiving the Comcast Agreement for
 16 Residential Services, Plaintiff elected not to opt out of the written arbitration provision while
 17 other subscribers in Washington State exercised this right. *See* Kane Decl. ¶ 8. Rather,
 18 Plaintiff proceeded to receive and pay for his service without objection. *Id.* ¶ 9.

19 **B. The Terms of the Parties' Arbitration Provisions**

20 The written arbitration provision prominently states, under the heading "**Binding**
 21 **Arbitration,**" as follows:

22 **Purpose.** If you have a Dispute (as defined below) with Comcast that
 23 cannot be resolved through an informal dispute resolution with Comcast,
 24 you or Comcast may elect to arbitrate that Dispute in accordance with
 the terms of this Arbitration Provision rather than litigate the Dispute in
 25 court. Arbitration means you will have a fair hearing before a neutral
 arbitrator instead of in a court by a judge or jury. Proceeding in
 arbitration may result in limited discovery and may be subject to limited
 26 review by courts.

1 *Id.*, Ex. 1 ¶ 13(a) (emphasis in original). Its scope extends to any “Disputes” between the
 2 parties, which are defined as follows:

3 **Definitions.** The term “Dispute” means any dispute, claim or
 4 controversy between you and Comcast regarding any aspect of your
 5 relationship with Comcast, whether based in contract, statute, regulation,
 6 ordinance, tort (including, but not limited to, fraud, misrepresentation,
 7 fraudulent inducement, negligence, or any other intentional tort), or any
 8 other legal or equitable theory, and includes the validity, enforceability
 9 or scope of this Arbitration Provision. “Dispute” is to be given the
 10 broadest possible meaning that will be enforced. As used in this
 11 Arbitration Provision, “Comcast” means Comcast and its parents,
 12 subsidiaries and affiliated companies and each of their respective
 13 officers, directors, employees and agents.

14 *Id.* ¶ 13(b) (emphasis in original).

15 The arbitration provision also contains a number of consumer-friendly provisions that
 16 make the arbitral process less costly and more flexible for subscribers such as Plaintiff. Aside
 17 from the right to opt out, which Plaintiff did not elect, the arbitration provision affords
 18 subscribers a convenient arbitral forum,¹ requires Comcast to advance all arbitral filing fees and
 19 all of the arbitrator’s costs and expenses,² permits subscribers to file in small claims court if
 20 they prefer that means of dispute resolution,³ does not require arbitral awards to be kept
 21 confidential,⁴ provides for an appeal and does not limit whatever right subscribers may have to

17 ¹ See Kane Decl., Ex. 1 ¶ 13(g) (“**Location of Arbitration.** The arbitration will take place at a location
 18 convenient to you in the area where you receive the service from us.”) (emphasis in original).

19 ² See *id.* ¶ 13(h) (“**Payment of Arbitration Fees and Costs.** COMCAST WILL ADVANCE ALL
 20 ARBITRATION FILING FEES AND ARBITRATOR’S COSTS AND EXPENSES UPON YOUR WRITTEN
 21 REQUEST GIVEN PRIOR TO THE COMMENCEMENT OF THE ARBITRATION.”) (emphasis and
 22 typography in original). If the subscriber prevails in the arbitration, the subscriber will have no obligation to
 23 reimburse Comcast for fees and costs that were advanced. *Id.* (“IF THE ARBITRATION PROCEEDING IS
 24 DETERMINED IN YOUR FAVOR, YOU WILL NOT BE REQUIRED TO REIMBURSE COMCAST FOR
 25 ANY OF THE FEES AND COSTS ADVANCED BY COMCAST.”) (emphasis and typography in original). In
 26 addition, if Comcast prevails in the arbitration, the subscriber only will be obligated to reimburse Comcast for fees
 27 and costs that were advanced if they would have been recoverable had the dispute been resolved in a court of law.
Id. (“IF THE ARBITRATION PROCEEDING IS DECIDED IN COMCAST’S FAVOR, YOU SHALL
 REIMBURSE COMCAST FOR THE FEES AND COSTS ADVANCED TO YOU ONLY UP TO THE EXTENT
 AWARDABLE IN A JUDICIAL PROCEEDING.”) (emphasis and typography in original).

28 ³ See *id.* ¶ 13(j) (“**Exclusions from Arbitration.** YOU AND COMCAST AGREE THAT THE FOLLOWING
 29 WILL NOT BE SUBJECT TO ARBITRATION: (1) ANY CLAIM FILED BY YOU OR BY COMCAST THAT
 30 IS NOT AGGREGATED WITH THE CLAIM OF ANY OTHER SUBSCRIBER AND WHOSE AMOUNT IN
 31 CONTROVERSY IS PROPERLY WITHIN THE JURISDICTION OF A COURT THAT IS LIMITED TO
 32 ADJUDICATING SMALL CLAIMS”) (emphasis and typography in original).

33 ⁴ See generally *id.*

1 appeal an arbitral award to a court of law,⁵ and does not prohibit an award of attorneys' fees if
 2 such an award is justified by the law under which the subscriber seeks relief.⁶

3 III. ARGUMENT

4 Plaintiff is obligated to arbitrate his claims pursuant to the terms of the written
 5 arbitration provision in the Comcast Residential Customer Agreement provided to him in
 6 February 2012. Because the written arbitration provision squarely encompasses Plaintiff's
 7 claims and he failed to opt out, Comcast respectfully requests that Plaintiff be compelled to
 8 arbitrate his dispute with Comcast, and this litigation be stayed pending completion of an
 9 arbitration proceeding.

10 A. Plaintiff Agreed to Arbitrate His Claims.

11 Congress has expressed a strong public policy favoring arbitration pursuant to which
 12 courts are not only encouraged, but required, to "rigorously enforce" arbitration agreements.
 13 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Congress enacted the FAA in
 14 order to "reverse the longstanding judicial hostility to arbitration agreements" and to place such
 15 agreements on "the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*,
 16 500 U.S. 20, 24 (1991); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745
 17 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts ...
 18 and enforce them according to their terms.") (citations omitted); *Perry v. Thomas*, 482 U.S.
 19 483, 489 (1987) (describing the FAA as "a congressional declaration of a liberal federal policy
 20 favoring arbitration agreements"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,
 21 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute

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⁵ See *id.* ¶ 13(e) ("Arbitration Procedures. . . . If an award granted by the arbitrator exceeds \$75,000, either party can appeal that award to a three-arbitrator panel administered by the same arbitration organization by a written notice of appeal filed within thirty (30) days from the date of entry of the written arbitration award.... [The arbitral award] shall be final and binding, except for any appellate right which exists under the FAA.") (emphasis in original).

⁶ See *id.* ¶ 13(h) ("Payment of Arbitration Fees and Costs. . . . NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS ARBITRATION PROVISION, COMCAST WILL PAY ALL FEES AND COSTS THAT IT IS REQUIRED BY LAW TO PAY.") (emphasis and typography in original).

1 resolution"); *Lutz v. Cont'l Servs., Inc.*, No. C07-974Z, 2007 WL 4165274, at *3 (W.D. Wash.
 2 Nov. 16, 2007) (Zilly, J.) ("There is a liberal federal policy favoring arbitration agreements.").

3 Arbitration agreements must meet only two conditions for the FAA to apply: (1) they
 4 must be in writing; and (2) they must be part of "a contract evidencing a transaction involving
 5 commerce." 9 U.S.C. § 2. Arbitration agreements that satisfy these two requirements are
 6 "valid, irrevocable, and enforceable" under federal law. *Id*; see also *Kilgore v. KeyBank Nat'l
 7 Ass'n*, 673 F.3d 947, 955 (9th Cir. 2012) ("The court's role under the Act is therefore limited to
 8 determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the
 9 agreement encompasses the dispute at issue. If the response is affirmative...the Act requires
 10 the Court to enforce the arbitration agreement in accordance with its terms") (internal quotation
 11 omitted).

12 In this case, both elements have been met. First, the parties' arbitration provision is
 13 unquestionably in writing. See Kane Decl., Ex. 1. Second, that provision indisputably
 14 evidences a transaction in interstate commerce. Indeed, it affirmatively states as much. See *id.*
 15 ¶ 13(e) ("Because the Service(s) provided to you by Comcast concerns interstate commerce, the
 16 Federal Arbitration Act ("FAA"), not state arbitration law, shall govern the arbitrability of all
 17 Disputes."). Accordingly, the arbitration provision is governed by the FAA.

18 Plaintiff's claims also are within the scope of the arbitration provision, which applies to
 19 "any dispute, claim or controversy between" the parties, "whether based in contract, statute,
 20 regulation, ordinance, tort (including, but not limited to, fraud, misrepresentation, fraudulent
 21 inducement, negligence or any other intentional tort), or any other legal or equitable theory."
 22 See, e.g., Kane Decl., Ex. 1 ¶ 13(b). As the Ninth Circuit recognizes, "all disputes" clauses of
 23 this sort are "broad and far reaching" in scope, *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207
 24 F.3d 1126, 1131 (9th Cir. 2000), and are "routinely used . . . to secure the broadest possible
 25 arbitration coverage." *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 745 (9th Cir. 1993). These
 26 clauses require arbitration of all disputes that "touch matters" covered by the contract defining
 27 the parties' relationship. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999).

1 As set forth in Plaintiff's complaint, Plaintiff's claims relate to Comcast contacting him
 2 regarding his failure to pay for the cable television and Internet services Comcast provided to
 3 him. *See Dkt. No. 1 ¶ 7* ("Defendants willfully and knowingly utilized automated telephone
 4 dialing systems to make and/or place a telephone call to Plaintiff's cellular telephone number,
 5 in effort to collect from Plaintiff an obligation, or alleged obligation, owed or due, or asserted
 6 to be owed or due."). Thus, Plaintiff's claims fall squarely within the scope of the parties'
 7 arbitration agreement and must be arbitrated, particularly in light of the presumption in favor of
 8 arbitrability.⁷ *See AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)
 9 (courts must presume that disputes are arbitrable "unless it may be said with positive assurance
 10 that the arbitration clause is not susceptible of an interpretation that covers the asserted
 11 dispute"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)
 12 (courts should determine scope of arbitration agreements "with a healthy regard for the federal
 13 policy favoring arbitration," and "any doubts concerning the scope of arbitrable issues should
 14 be resolved in favor of arbitration"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S.
 15 395, 406 (1967); *Tuminello v. Richards*, No. C11-5928BHS, 2012 WL 750305, at *2 (W.D.
 16 Wash. Mar. 8, 2012) ("the FAA divests courts of their discretion and requires courts to resolve
 17 any doubts in favor of compelling arbitration") (Settle, J.).

18 **B. Plaintiff Did Not Opt Out Of The Arbitration Provision**

19 Despite being given an opportunity to opt out of the arbitration provision, Plaintiff
 20 failed to exercise this right. Plaintiff received the Comcast Residential Customer Agreement
 21 along with his self-install kit on February 3, 2012. Kane Decl. ¶ 4. If Plaintiff wished to opt
 22 out, the arbitration provision required him to notify Comcast by March 4, 2012. *See id.*, Ex. 1¶
 23 13(c) ("YOU MUST NOTIFY COMCAST IN WRITING WITHIN 30 DAYS OF THE DATE
 24 THAT YOU FIRST RECEIVE THIS AGREEMENT"). While other Comcast subscribers in

25 ⁷ To the extent the scope of the arbitration provision was in question, that question would be for the arbitrator to
 26 decide. *See, e.g.*, Kane Decl., Ex. 1 ¶13(b) (defining "Dispute" as "any dispute, claim or controversy between you
 27 and Comcast," including "the validity, enforceability or scope of this Arbitration Provision"). Parties may agree
 that arbitrators should decide the question of arbitrability in the first instance. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995).

1 Washington State exercised their rights to opt out of the arbitration provision by either opting
 2 out online or sending written notice to Comcast, Plaintiff did not. *See* Kane Decl. ¶ 8. Rather,
 3 Comcast began billing Plaintiff for his services, and Plaintiff began paying for those services
 4 without objection. *Id.* ¶ 9. As a result, Plaintiff is bound by the arbitration provision.

5 **C. Plaintiff Should Be Compelled to Honor His Contract.**

6 Where the FAA governs an arbitration agreement and a dispute falls within the
 7 agreement's scope, courts should compel arbitration and stay further judicial proceedings. *See*
 8 9 U.S.C. §§ 3, 4; *see also Moses H. Cone*, 460 U.S. at 22 ("[The FAA] provides two parallel
 9 devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute
 10 referable to arbitration, 9 U.S.C. § 3, and an affirmative order to engage in arbitration, § 4.");
 11 *Dean Witter Reynolds*, 470 U.S. at 218 ("By its terms, the [FAA] leaves no place for the
 12 exercise of discretion by a district court, but instead mandates that district courts *shall* direct the
 13 parties to proceed to arbitration on issues as to which an arbitration agreement has been
 14 signed.") (emphasis in original); *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130
 15 (9th Cir. 2000) (a district court must compel arbitration where "a valid agreement to arbitrate
 16 exists" and "the agreement encompasses the dispute at issue."); *Tuminello*, 2012 WL 750305,
 17 at *2 ("The FAA requires courts to stay proceedings when an issue before the court can be
 18 referred to arbitration") (Settle, J.). Here, a valid agreement to arbitrate exists and the parties'
 19 dispute is within the scope of that agreement. Accordingly, the Court should direct Plaintiff to
 20 submit his claims to a binding arbitration proceeding pursuant to the terms of that agreement.

21 **IV. CONCLUSION**

22 For the foregoing reasons, Defendants respectfully request that the Court stay this
 23 action in its entirety and direct Plaintiff to submit his claims to binding arbitration on an
 24 individualized basis pursuant to the terms of his written arbitration provision with Comcast.
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1 DATED: October 5, 2012

Respectfully submitted,

2
3 Davis Wright Tremaine LLP
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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel for record who receive CM/ECF notification, and that the remaining parties shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 5th day of October, 2012.

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